

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3624 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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MULABHAI B RATHOD

Versus

CHIEF TOWN PLANNER & ARCHI ADVISOR & ANR.

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Appearance:

MR BR GUPTA for Petitioner

None present for Respondents

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 27/08/96

ORAL JUDGMENT

Heard learned counsel for the petitioner and perused the Special Civil Application. The petitioner, President of Shree Karmachari Co-operative Housing Society Limited, Gandhinagar, filed this petition before this Court and prayer has been made therein for quashing of the orders annexures 'A' and 'B', under which the authorities have declined to grant permission for raising construction of the houses on the land in dispute. This

permission was necessary in accordance with the provisions of the Gujarat New Capital (Periphery) Control Act, 1960 (hereinafter referred to as the Act, 1960).

2. The society has claimed itself to be the owner and in occupation of the land comprised in Survey Nos.56, 57, 58/1, 58/2, 64/1, 79 and 88. It is not in dispute that the aforesaid land is covered in the control area declared under the provisions of the Act 1960. With a view to obtain "No Objection Certificate" (NOC) for construction of residential houses on cooperative basis on the land aforesaid, the society filed an application in the prescribed form A under Rule 5 of the Rules framed under the aforesaid Act before respondent No.1. This application is purported to be filed under Sub Section (1) of Section 6 of the Act 1960. This application came to be dismissed by respondent No.1 under the aforesaid Act under the communication dated 8th August 1983. Against the aforesaid order of respondent No.1, the petitioner preferred an appeal before the appellate authority. The appellate authority also dismissed the appeal under its order dated 20th February 1984. Hence this Special Civil Application.

3. The learned counsel for the petitioner, Shri B.R. Gupta contended that the respondent No.1 was not authority competent to pass any order on the application of the petitioner and as such, its order dated 8th August 1983 is bad in law. The learned counsel for the petitioner further contended that the power which has been given to the respondent No.1 to exercise the powers of Collector under the aforesaid Act has been taken away on 7th July 1983 and it has been given to the Collector. It has next been contended that the competent authority, i.e. the respondent No.2 herein has not passed order on the application of the petitioner within stipulated period as prescribed under Sub Section 6 of Section 6 and as such the NOC for construction shall be deemed to have been given subject to restrictions indicated in the plans under Section 4.

4. I have given my thoughtful considerations to the submissions made by the learned counsel for the petitioner. The appellate authority has considered the first submission made by the learned counsel for the petitioner and has declined to interfere in the order made by respondent No.1 on this technical ground. The appellate authority has held that on 8th August 1983, the respondent No.1 was not competent authority to decide application of the petitioner filed by it under Section 6 of the Act 1960, but the appellate authority has

proceeded to decide the matter on merits and it has reached to the conclusion that the NOC prayed for by the petitioner for construction by raising houses on the land in dispute cannot be granted under the provisions of the Act 1960. This course which has been adopted by the appellate authority cannot be said to be arbitrary or perverse. It is a settled law that the appellate authority has powers coextensive with the powers of the original authority and in case the party concerned is able to make out a case for grant of relief which could have been granted by the lower authority or the original authority, it has all the powers to pass necessary orders. It is true that the appellate authority should have adopted other mode of remanding the matter to the Collector, the respondent No.2 herein, but the course which has been adopted in the present case was also legally permissible and as such, on this ground alone the order of the appellate authority does not deserve to be set aside. Though on the first submission made by the learned counsel for the petitioner, prima-facie, I find some substance therein, but I do not consider it to be appropriate to remand the matter to the 2nd respondent on this technical ground. The substance of the matter has to be considered and only in case the order which has been made by the appellate authority is considered to be illegal or unwarranted and the petitioner is found to be entitled for grant of NOC for raising of construction of residential houses on the land in question, then only interference can be made sitting under Article 226 and 227 of the Constitution of India.

5. The merits of the matter has to be considered and I proceed to consider the same. Section 3 of the Act 1960 makes a provision for declaration of controlled area. The State Government may, by notification in the Official Gazette, declare the whole or any part of the area to which the Act 1960 extends, to be controlled area for the purposes of this Act. Sub Section 2 of Section 1 provides that the Act shall extend to the area adjacent to and within a distance of five miles on all sides from the outer boundary of the new capital of the State of Gujarat. The Act 1960 has been enacted to provide for controlling and regulating development in the periphery of new capital of the State of Gujarat. New Capital means sight of permanent capital of the State of Gujarat, comprising such area as the State Government may, from time to time, by Notification in the Official Gazette, specify in this behalf. Section 4 of the Act 1960 makes a provision for publication of plans of controlled area. Section 5 puts restrictions in the controlled area and provides that except as hereinafter provided, no person

shall erect any building or make or extend any excavation, or lay out any means of access to a road, in the controlled area, save in accordance with the plans and restrictions referred to in Section 4 and save with the previous permission of the Collector in writing. Section 6 of the Act 1960 provides for applications for permission and grant or refusal of such permission. Section 11 of the Act 1960 puts on use of land within controlled area, i.e. no land within a controlled area shall, except with the permission of the State Government be used for purposes other than those for which it was used on the date of notification under Sub Section (2) of Section 3.

6. The learned counsel for the petitioner has not disputed before this Court that the land in question is situated in the agricultural zone under the plans published under Section 4 of the Act 1960. It is also not in dispute that the land falls within the controlled area wherein the same are covered under agricultural zone. The learned counsel for the petitioner is unable to bring on record any material to show that on the date of Notification under Sub Section 2 of Section 3, the land in dispute were not in use for agricultural purposes. The petitioner has not come up with the case that these agricultural lands were converted for non agricultural purposes at any date earlier to the date of Notification under Sub Section 2 of Section 3 of the Act 1960. The very fact that the petitioner has moved an application to the respondent No.1 for grant of "No Objection Certificate" for construction of residential houses on the land in question goes to show and establish that these lands were reserved in agricultural zone of the control area and the same were used for agricultural purpose. In view of this fact, the NOC for raising of residential houses on the land in dispute could not have been granted under the provisions of the Act 1960 and exactly the same thing has been done. Section 11 of the Act 1960 provides that no land within a controlled area be used for the purposes other than those for which it was used on the date of Notification under Sub Section 2 of Section 3, except with permission of the State Government. It is not case of the petitioner that any permission has been granted by the State Government for use of the land in dispute for non agricultural purpose.

7. Taking into consideration these facts, though the respondent No.1 was not authority competent to dispose of the application of the petitioner on the date on which it was decided but the NOC for raising construction of residential houses in the disputed land could not be

granted under the provisions of the Act 1960, and therefore no interference can be made by this Court.

8. So far as the second contention of the learned counsel for the petitioner regarding deemed permission is concerned, it is suffice to say that the same deserves outright rejection. Sub Section 6 of Section 6 of the Act 1960 though makes a provision where at the expiration of period of three months after an application under Sub Section (1) has been made to the Collector, no order in writing has been passed by the Collector, permission shall be deemed to have been given subject to the restrictions indicated in the plans under Section 4. But the benefits of this provision are not given to the petitioner and have rightly not been given by the appellate authority, as the application filed by the petitioner under Sub Section 1 of Section 6 has been dismissed. This deeming provision will not be applicable where NOC prayed for construction of residential houses on the land which has been put in agricultural zone in the controlled area and under Section 11 of the Act 1960, the State Government has not granted any permission for change of use thereof. In case the contention of the petitioner is accepted, then though NOC for construction of residential houses on the land in question could not have been granted, but by virtue of this deeming clause, it will stand granted to the petitioner. This deeming provision, if given effect to in such cases, then the permission will be contrary to the provisions of the Act 1960, which is not the intention of the legislature nor such deeming provision can be read in context of the present case. Reading of deeming provision in a manner in which it is sought to be canvassed by the learned counsel for the petitioner before this Court will amount to violating the very purpose and object of the Act 1960. Not only this, but what directly is not permissible will become available or permitted indirectly merely because of application of this deeming provision under Sub Section 6 of Section 6 the Act 1960. Leaving apart the aforesaid difficulties in way of the petitioner for giving effect to the deeming provision of Sub Section 6 of Section 6 of the Act 1960, it is equally settled law that sitting under Article 226 of the Constitution of India or Article 227 thereof, this Court will not perpetuate any illegality. In case the contention of made by the learned counsel for the petitioner is accepted and the application of the petitioner for grant of NOC for construction of residential houses on the land in dispute is deemed to have been granted under Sub Section 6 of Section 6 of the Act 1960, then this Court will permit construction of residential houses on the

land in dispute contrary to the provisions of the Act 1960. The deeming clause cannot be allowed to frustrate the object and purpose of the Act 1960.

9. Any reference, if required in this respect, then it may have to decision of Supreme Court in the case of Gadde Venkateswara Rao v. Government of Andhra Pradesh & Ors., reported in AIR 1966 SC 828, a decision of Rajasthan High Court in the case of Jagan Singh v. State Transport Appellate Tribunal, Rajasthan & Anr., reported in AIR 1980 RAJ 1, decision of Kerala High Court in the case of A.M. Mani v. Kerala State Electricity Board & Ors., reported in AIR 1968 KER. 76, decision of the Patna High Court in the case of Devendra Prasad Gupta v. The State of Bihar & Ors., reported in AIR 1977 PATNA 166, and another decision of the Patna High Court in the case of Chintamani Sharan Nath Sahadeo v. State of Bihar & Ors., reported in AIR 1990 PATNA 165.

10. Taking into consideration the totality of the facts of the case and after going through the order of the appellate authority, no interference by this Court is called for in the matter. In the result, this Special Civil Application fails and the same is dismissed. Rule discharged. No order as to costs.

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(sunil)